No. 86-327 (6)

In the Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether an otherwise eligible claimant for black lung benefits automatically invokes a presumption of compensable disability under 20 C.F.R. 727.203(a) by introducing one piece of qualifying medical evidence.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-101a) are reported at 785 F.2d 424.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1986. Petitions for rehearing were denied on April 21, 1986 (Pet. App. 152a-154a). The Chief Justice extended the time for filing a petition for a writ of certiorari to August 29, 1986 (Pet. App. 155a). The petition was filed on August 29,

1986, and this Court granted certiorari on January 12, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The non-federal respondents are coal miners who filed claims with the Secretary of Labor for black lung benefits. Upon completion of administrative proceedings, their cases were heard by the en banc Fourth Circuit. The court overruled several prior decisions and adopted a new interpretation of the regulation that defines the proof scheme for adjudication of the claims at issue. Petitioners, who are coal mine operators and an operator's insurer, challenge the Fourth Circuit's ruling. The federal respondent agrees that the Fourth Circuit's ruling should be reversed.

1. Statutory and Regulatory Framework

Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended in 1972, 1977, 1978, and 1981, 30 U.S.C. (& Supp. III) 901 *et seq.*, establishes a benefit program for coal miners who are totally disabled by pneumoconiosis (black lung disease) arising out of coal mine employment. See generally *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Claims filed prior to July 1, 1973, are filed under Part B of the program and are adjudicated by the Social Security Administration (SSA) pursuant to regulations codified at 20 C.F.R. Pt. 410. See 30 U.S.C. 924, 925. Claims filed on or after July 1, 1973, are filed under Part C of the program and are adjudicated by the Secretary of Labor. See 30 U.S.C. (& Supp. III) 925, 931. Part C claims are further divided into two groups: those filed on or after April 1, 1980, which are governed by the Secretary's permanent criteria, codified at 20 C.F.R. Pt. 718 (see 20 C.F.R. 725.4(a)); and those filed prior to April 1, 1980, which are governed by the Secretary of Labor's "interim regulations," codified at 20 C.F.R. Pt. 727.

This case involves the Part C interim regulations and the proof scheme they establish for adjudicating claims for benefits filed by miners. Those regulations apply to approximately 10,000 pending claims, filed between July 1, 1973 and April 1, 1980. Benefits under this part of the program—indeed, under all of Part C—are paid by coal mine operators or, in certain instances specified by statute, by a federal Black Lung Disability Trust Fund.[1] The federal respondent—the Director, Office of Workers' Compensation Programs—is responsible, by delegation of the Secretary of Labor's authority, for administering the federal fund and for the initial processing of claims under Part C of the black lung program. 20 C.F.R. 701.201, 701.202.

The Part C interim regulations, promulgated in 1978 (43 Fed. Reg. 36818), were authorized by Section 2 of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (codified at 30 U.S.C. 902(f)). The statute requires that the interim regulations "shall not be more restrictive than"

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[1] The Black Lung Disability Trust Fund pays benefits where a miner's last coal mine employment ended before January 1, 1970, where a responsible operator cannot be identified, and in certain cases that are reopened after initial denial. 30 U.S.C. 932(c)(1), (2), and (j)(3), 934. The Fund is financed by an excise tax on the sale of coal (see 26 U.S.C. 4121) and has the power to borrow from the United States Treasury when its expenditures exceed its income (26 U.S.C. 9501(c)). The Fund is currently 2.9 billion dollars in debt to the federal treasury.

the criteria governing pre-July 1, 1973 claims under Part B. 30 U.S.C. 902(f)(2). It further requires that, like the Part B regulations, they ensure that "all relevant evidence" be considered "where relevant" in adjudicating claims for benefits. 30 U.S.C. 923(b). See H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978).

Under the Part C interim criteria, miners need not prove all three elements of a claim for black lung benefits—the disease of pneumoconiosis, total disability, and causation by coal mine employment. See 30 U.S.C. 901, 902(b).[2] Rather, under 20 C.F.R. 727.203, certain miners may, by establishing certain limited "basic facts" (see Pet. App. 39a n.5 (opinion of Phillips, J.)), invoke a presumption of compensable total disability and hence entitlement to benefits. The employer or Director may then rebut the presumption.[3]

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[2] The statute (30 U.S.C. 902(b)) and regulations (20 C.F.R. 727.202) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment. For clarity, we will hereafter use "pneumoconiosis" to refer solely to the disease, treating the question of causation as distinct.

[3] If a claimant is unable to invoke the presumption or the presumption is invoked and rebutted, the claimant may nonetheless attempt to establish eligibility in either of two ways. The claimant may proceed under 20 C.F.R. Pt. 718. See 20 C.F.R. 727.203(c) and (d). Alternatively the claimant may proceed directly under the statute and thus seek to prove the elements of the claim by a preponderance of the evidence, using any applicable statutory presumptions. See 30 U.S.C. 921(a) and (c)(1)-(5). The court of appeals considered the claims at issue in this case only under the Part C interim criteria.

Specifically, Subsection (a) of 20 C.F.R. 727.203[4] provides that a miner who engaged in coal mine employment for at least 10 years is presumed to be totally disabled due to pneumoconiosis arising out of that employment if any one of four specified medical evidentiary requirements is met.[5] Subsection (b)

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[4] Hereinafter, "Subsection ——" and "§ —" refer to subsections of 20 C.F.R. 727.203 unless otherwise indicated.

[5] 20 C.F.R. 727.203(a) states:

> *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);
>
> (2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than [specified] values * * * [;]
>
> (3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than [specified] values * * * [;]
>
> (4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;
>
> * * * * *

Subsection (a)(5), which provides for lay evidence in the case of a deceased miner where no medical evidence is available, is not at issue in this case.

provides that the presumption may be rebutted by showing that the miner is doing, or is able to do, his usual coal mine work or comparable gainful work; that his disability does not arise, even in part, from coal mine employment; or that he does not suffer from pneumoconiosis.[6] In conformity with the statutory requirement (30 U.S.C. 923(b)), Subsection (b) also provides that in adjudicating a claim under the interim criteria, all relevant medical evidence shall be considered.

2. Administrative Proceedings

All three cases below began when the non-federal respondents, who are miners or former miners, filed claims for benefits with the federal respondent. Each claim was initially decided by an Office of Workers' Compensation Programs Deputy Commissioner. 20 C.F.R. 725.418, 725.419. In each case, the non-prevailing party requested a hearing before an administrative law judge (ALJ) (see 20 C.F.R. 725.419(a), 725.451)), who rendered a decision after receiving additional evidence (see 20 C.F.R. 725.476, 725.477). In respondent Stapleton's case, the ALJ invoked the presumption based on a single positive X-ray, but then found the presumption rebutted (Pet. App. 106a-117a). In respondent Ray's case, the ALJ refused to invoke the presumption, weighing the evidence and finding it unpersuasive in any of the Subsection (a) categories (Pet. App. 125a-134a). In respondent Cornett's case, the ALJ invoked the presumption based on the weight of the evidence in three categories and then found the presumption unrebutted (Pet. App. 141a-151a).

The ALJ decisions were appealed to the Benefits Review Board, which reviewed them for substantial evidence and conformity with law (see 30 U.S.C. (Supp. III) 932(a), incorporating 33 U.S.C. 921(b)(3)) and affirmed in all three cases. In Stapleton's case, the Board affirmed the ALJ's denial of the claim but held that the presumption should not have been invoked based on a single piece of evidence (Pet. App. 102a-105a). In Ray's case, the Board affirmed the ALJ's finding that Ray was not entitled to the presumption (Pet. App. 118a-124a). In Cornett's case, the Board affirmed both the ALJ's invocation of the presumption and his finding of no rebuttal (Pet. App. 138a-140a, 135a-137a).

3. Judicial Proceedings

The unsuccessful parties before the Board filed petitions for review in the Fourth Circuit, which sua sponte ordered the three cases consolidated and heard en banc. The court directed the parties to address two questions regarding the proper interpretation of

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[6] 20 C.F.R. 727.203(b) states:

> *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:
>
> (1) the evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or
>
> (2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or
>
> (3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or
>
> (4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

the interim regulations: whether a claimant could invoke the presumption with a single piece of "qualifying" medical evidence;[7] and whether and to what extent "non-qualifying" medical evidence could rebut the presumption. The court requested the parties to address these issues in light of its previous panel decisions in *Hampton* v. *United States Dep't of Labor Benefits Review Bd.*, 678 F.2d 506 (4th Cir. 1982), *Consolidation Coal Co.* v. *Sanati*, 713 F.2d 480 (4th Cir. 1983), and *Whicker* v. *United States Dep't of Labor Benefits Review Bd.*, 733 F.2d 346 (4th Cir. 1984).[8]

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[7] The term "qualifying" was used by the court to refer to medical evidence that is positive and would suffice, in the absence of any contrary evidence of the same type, to invoke the presumption. For example, an X-ray that disclosed pneumoconiosis (§ (a)(1)) or ventilatory studies that revealed a respiratory or pulmonary impairment of the specified magnitude (§ (a)(2)) would be qualifying evidence. Negative or uncertain results on an X-ray or in ventilatory studies would, by contrast, be "non-qualifying."

In addition, as Subsection (a) itself indicates, all medical evidence is subject to regulatory standards for quality. See, *e.g.*, 20 C.F.R. 410.428(a)(1), (b), and (c) (X-ray, biopsy, and autopsy standards) (incorporated in 20 C.F.R. 727.203(a)(1), 727.206(a)); 20 C.F.R. 410.430 (ventilatory study standards) (incorporated in 20 C.F.R. 727.203(a)(2)). Evidence that meets these standards is referred to as "conforming" evidence.

[8] In *Sanati*, the court agreed with the Director that invocation of the presumption under Subsection (a)(4) must depend on a weighing of all physician report evidence. 713 F.2d at 481-482. In *Hampton* and *Whicker*, the court placed significant restrictions on the range of permissible rebuttal evidence, ruling that a doctor's opinion based in part upon non-qualifying ventilatory function and blood gas test results constituted "improper rebuttal evidence" (*Hampton*, 678 F.2d at 508). See *Whicker*, 733 F.2d at 348.

The Director intervened in the appeal, arguing that a claimant may invoke the presumption only by a preponderance of the medical evidence in a particular category—for example, by proving the existence of pneumoconiosis by a preponderance of the X-ray, biopsy, and autopsy evidence (under § (a)(1)), or by proving a totally disabling respiratory or pulmonary impairment by a preponderance of the "[o]ther medical evidence" (under § (a)(4)). The Director also argued that, once the presumption was invoked, the burden of persuasion, and not just the burden of going forward, shifted to the employer or Director. He argued that, at the rebuttal stage, negative or otherwise non-qualifying medical evidence could be relevant, but only if submitted in support of a reasoned medical judgment. See Pet. App. 84a-87a (opinion of Sprouse J. (quoting Director's brief)). The Director further argued that facts already proven at the presumption stage could not be relitigated at the rebuttal stage, at least not with the same type of evidence.[9]

The en banc court of appeals issued a per curiam opinion announcing the disposition of the three cases before it and referring, for the guiding rules of law, to various combinations of its four lengthy opinions.[10]

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[9] For example, proof at the invocation stage of pneumoconiosis based on X-ray, biopsy, and autopsy evidence (under § (a)(1)) implies that the existence of pneumoconiosis may not be relitigated at the rebuttal stage, at least not without introducing relevant evidence other than X-ray, biopsy, or autopsy evidence. See Pet. App. 37a-40a (opinion of Phillips, J.) (summarizing Director's position).

[10] The court split into three groups. One group (Chief Judge Winter, Judge Hall, Judge Sprouse, and Judge Sneeden) was represented in two opinions—one by Judge Hall (Pet. App. 5a-33a), a second by Judge Sprouse (Pet. App. 56a-

A majority of the court rejected the Director's preponderance standard for invocation, holding that an otherwise eligible claimant needs to produce only one credible piece of qualifying evidence in any of the four categories specified in Subsection (a) to invoke the presumption of compensable disability (Pet. App. 3a).[11] A different majority held that all relevant medical evidence could be considered on rebuttal, including non-qualifying test results, subject only to the statutory limitation (30 U.S.C. 923(b)) that a single negative X-ray may not be the basis for denying benefits (Pet. App. 4a); this holding rejected the Director's view that non-qualifying evidence (*e.g.*,

92a). A separate group of four judges expressed its views in an opinion by Judge Phillips (Pet. App. 34a-55a), which Judges Russell, Murnaghan, and Ervin joined. A third group expressed its views in an opinion by Judge Widener (Pet. App. 93a-101a), which Judges Chapman and Wilkinson joined.

The first and third groups formed the majority on the invocation issue. The second and third groups formed the majority on the rebuttal issue.

[11] A different majority of the court recognized one exception to this result, which arises under Subsection (a)(4). A single qualifying physician's report suffices to invoke the presumption; but if there is no such report, all other medical evidence must be weighed to determine if the presumption may be invoked under that subsection (Pet. App. 3a). Four of the judges who advocated this result agreed with the Director that the evidence in *all* categories should be weighed before the presumption is invoked (*id.* at 51a (opinion of Phillips, J.)); the three additional members of the court who concurred in this result apparently believed that the regulatory language, which requires invocation if "[o]ther medical evidence * * * establishes the presence of a totally disabling respiratory or pulmonary impairment" (§ (a)(4)), imposes by its plain terms a burden of persuasion if there is no qualifying physician's report (Pet. App. 96a-97a (opinion of Widener, J.)).

negative X-rays) should be considered probative only when offered in support of a reasoned medical opinion (see Pet. App. 25a-27a (opinion of Hall, J.)). All of the judges agreed with the Director that the rebutting party bears the burden of persuasion on rebuttal (see Pet. App. 4a; *id.* at 23a-25a (opinion of Hall, J.)).[12] Because the two divided holdings departed from the court's previous panel decisions, the court overruled the three panel decisions it had asked the parties to discuss when it set the cases for en banc hearing (see page 8, *supra*).

The several opinions below advance a number of reasons for the holding, challenged in this Court, that a claimant can generally invoke the presumption by a single qualifying test result. All the judges in the majority pointed to the language and structure of the regulation. See Pet. App. 20a, 23a (opinion of Hall, J.), 97a (opinion of Widener, J.). They noted, in particular, that Subsection (a)(1) provides that the presumption is invoked if "[*a*] chest roentgenogram * * * establishes the existence of pneumoconiosis" (emphasis added) and that the requirement that "all relevant medical evidence shall be considered" is included in Subsection (b), governing rebuttal, not Subsection (a), governing invocation of the presumption. The judges in the majority further concluded that a preponderance-of-the-evidence requirement would frustrate congressional intent to facilitate miners' efforts to prove their claims. Pet.

[12] The court also unanimously agreed with the Director (Pet. App. 29a-32a) that 20 C.F.R. 725.608(a) requires a liable coal mine operator to pay interest on past-due benefits accruing from the 30th day after the agency's initial determination to grant the claim. That aspect of the court's decision is not at issue here.

App. 70a, 77a-83a (opinion of Sprouse, J.), 94a (opinion of Widener, J.).[13] In addition, one group in the majority reasoned that the Director's approach, by generally foreclosing relitigation at the rebuttal stage of facts established at the presumption stage, would violate the statutory and regulatory command that all relevant evidence be considered. See Pet. App. 21a (opinion of Hall, J.), 71a & n.10 (opinion of Sprouse, J.). The majority thus viewed the Director's interpretation as unreasonable (Pet. App. 17a-18a (opinion of Hall, J.)) and refused to defer to it.[14]

A minority of the court agreed with the Director that a claimant should be required to prove the facts necessary to invoke the presumption in any of the Subsection (a) categories by a preponderance of the evidence. Pet. App. 34a-55a (opinion of Phillips, J.). The minority urged deference to the Director's interpretation as a permissible reading of the regulation

[13] All of the majority judges also concluded that the Administrative Procedure Act (APA), 5 U.S.C. 554, 556, 559, to the extent it establishes a burden of persuasion, had been superseded by the particular statutory and regulatory scheme for black lung benefits. Pet. App. 22a n.8 (opinion of Hall, J.), 93a (opinion of Widener, J.).

[14] One group in the majority asserted that the Director's brief amounted to "a bald litigation statement" and included no contention that "he has previously or consistently interpreted the regulation as he now interprets it as an advocating party" (Pet. App. 56a-57a (opinion of Sprouse, J.)). The other group in the majority read the comments of the Secretary upon promulgation of the interim regulations (43 Fed. Reg. 36826 (1978)) as establishing that the single-item-of-evidence view was the originally intended meaning and thought this evidence essentially decisive. Pet. App. 94a (opinion of Widener, J.).

that is consistent with the statute. *Id.* at 36a. Noting "the range of arguably reasonable interpretations that are possible with respect to the details of a regulation" such as this one, the dissenters found deference to the administrative interpretation essential "to encourage national uniformity of application" (*id.* at 36a n.2). In arguing for adoption of the preponderance standard, they also relied on the regulation's requirement that a claimant "establish" the necessary facts to invoke the presumption, just as the rebutting party must "establish" its case, as the full court agreed. *Id.* at 42a.[15] Finally, the dissenting judges argued that the majority was mistaken in thinking that the Director's interpretation renders the presumption irrebuttable: when a claimant has proved any of the "basic facts" by a preponderance of the evidence in a Subsection (a) category (*e.g.*, pneumoconiosis, under § (a)(1)), the operator remains free to rebut the resulting "presumed facts" (*e.g.*, mine-relatedness and total disability, under § (b)(1), (2), and (3)).

Applying its new interpretation of the interim regulations to the three cases before it, the court of appeals first affirmed the Board's denial of benefits (though not its reasoning) in Stapleton's case, concluding that the ALJ properly invoked the presumption and properly found it rebutted (Pet. App. 5a). In Ray's case, the court vacated the Board's decision, concluding that the ALJ should have invoked the presumption. and remanded for consideration of rebuttal (*ibid.*). In Cornett's case, the court affirmed

[15] The dissenters further asserted that the preponderance standard was not only the usual standard in civil litigation but the standard dictated by the APA where, as here, no other standard was specified. Pet. App. 41a-42a n.6.

the award of benefits, concluding that the presumption was properly invoked and not rebutted, but remanded for calculation of interest (*ibid.*).

On January 12, 1987, this Court granted the petition filed by the mine operators in Cornett's and Ray's cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The Secretary of Labor's Part C interim regulations permit certain claimants for black lung benefits to invoke a presumption of entitlement to benefits without proving all three elements of a valid claim—(i) pneumoconiosis (ii) that is totally disabling and (iii) was caused by coal mine employment. A miner with ten years' coal mine employment may invoke a rebuttable presumption of total mine-related pulmonary or respiratory disability (or death) by "establish[ing]" the facts specified, using the evidence specified, in any of the four categories listed in Subsection (a) of 20 C.F.R. 727.203—pneumoconiosis, as demonstrated by X-ray, biopsy, or autopsy evidence (§ (a)(1)); chronic respiratory or pulmonary disease, as demonstrated by ventilatory studies (§ (a)(2)); certain lung impairments, as demonstrated by blood gas studies (§ (a)(3)); or totally disabling respiratory or pulmonary impairment, as demonstrated by other medical evidence, including physicians' opinions (§ (a)(4)). A showing in any of the four categories leaves some or all of the three statutory elements of the claim for benefits unproved, but the presumption shifts the burden of persuasion on those elements to the mine operator or Director.

In the Director's view of this proof scheme, the claimant, in order to invoke the presumption under one of the Subsection (a) categories, must establish the fact or facts specified in that category (the

"basic" facts) by a preponderance of the specified type of evidence. Such a showing triggers a presumption of compensable disability, and the rebutting party then bears the burden of disproving the unproven elements of a valid claim to benefits (the "presumed" facts). Relitigation of the basic facts is foreclosed—with one infrequently used exception: to the extent there is any evidence other than the type used at invocation that is relevant to the basic facts, the rebutting party may seek to rebut the basic facts using such evidence.

The court of appeals construed the interim regulations to embody a different kind of proof scheme. The court held that the presumption is automatically invoked when the claimant introduces a single qualifying piece of evidence in one of the four Subsection (a) categories, no matter how greatly outweighed that piece of evidence is by other evidence within the same category. Apparently, however, the basic fact thus "established" at the invocation stage remains fully open for relitigation on rebuttal, with the burden of persuasion having shifted to the operator or Director. In the court's view, the presumption operates as an easy burden-shifting device, but does not establish separate stages for adjudicating distinct elements of a benefits claim.

II. The Director's view of the proof scheme created by the interim regulations gives meaning to the regulation's requirement that the claimant "establish" the basic facts in order to invoke the presumption, and it sets out an orderly method for litigating the several elements of a valid claim for benefits. It is also wholly consistent with statutory requirements and congressional intent and is in accord with, though not mandated by Section 7(c) of the Administrative Procedure Act (now codified at 5 U.S.C.

556(d)). It provides for consideration of "all relevant evidence," as required by the statute (30 U.S.C. 923(b)). And because the standards applicable to Part B claims require the claimant to prove the basic invocation facts by a preponderance of the evidence, the Director's similar reading of the Part C interim regulations fully reflects the congressional command that the interim regulations be no more restrictive than the Part B standards (30 U.S.C. 902(f)(2)).

The Director has consistently maintained that all like-kind evidence must be weighed at the invocation stage. Moreover, the Benefits Review Board has long adjudicated claims under the interim regulations in accordance with this view. For those reasons, and because the Office of Workers' Compensation Programs has been the agency responsible for administering the regulations from the time they were promulgated, the Director's view of the regulation is entitled to deference and should be adopted by this Court.

ARGUMENT

THE DIRECTOR'S READING OF THE INTERIM REGULATIONS SHOULD BE ACCEPTED BY THIS COURT

We think it important to note at the outset that our disagreement with the Fourth Circuit's ruling is not directed at the results it would produce in adjudicating particular claims for benefits. Although few claims have been adjudicated under the Fourth Circuit's standards, we have no reason to believe that those standards will produce results different from those of the Director's reading. The Director and the Benefits Review Board have long adhered to the "true doubt" rule, which requires that the claimant prevail on those issues as to which the evidence is in equi-

poise (see, *e.g.*, 43 Fed. Reg. 36826 (1978)); in view of that rule, the Director's requirement that the claimant prove the basic invocation facts by a preponderance of the evidence appears to have much the same effect as the Fourth Circuit's imposition of a preponderance burden on the rebutting party. The difference is that the Director's reading requires a weighing process at the invocation stage, whereas the court of appeals' reading requires it at the rebuttal stage. With doubts resolved in favor of the claimant under the Director's approach, it is difficult to see how this difference will change the outcome of specific cases.

The grounds for our disagreement with the court of appeals' ruling are that the sudden change of standards will greatly disrupt the adjudication of a large body of cases and that the court had no reason to reject the Director's position, which we think is the better reading of the admittedly ambiguous regulatory language and is entitled to judicial deference. See *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Thus, it is clear from the large number of remands that have already taken place (see Fed. Resp. Br. 14) that the Fourth Circuit's rejection of the long-followed standards will require relitigation of numerous claims in an already overburdened adjudicatory system. Because the Director's view is reasonable and avoids this apparently pointless disruption that the court of appeals' decision effects, the court of appeals' decision should be reversed.

A. The Director's view is a reasonable construction of the regulations

1. The regulatory language does not clearly and unambiguously define the claimant's burden at the

invocation stage. As Judge Phillips pointed out (see Pet. App. 46a-47a n.11), even a cursory reading of the regulation at issue, 20 C.F.R. 727.203, reveals that it is hardly a model of precise and unambiguous drafting. The regulatory language is, however, quite consistent with the Director's interpretation that, in determining whether the presumption is triggered, all of the evidence of the specified type must be weighed under a preponderance standard. Indeed, the regulatory language offers strong reason to prefer this reading to that of the court of appeals.

First, although Subsection (a)(1) speaks of "[a]" chest X-ray, biopsy, or autopsy establishing pneumoconiosis, the other three subsections all suggest that more than a single piece of evidence should be considered. Those provisions expressly use inclusive terms in describing the evidence to be considered—the plural "studies" in Subsections (a)(2) and (3);[16] the general "[o]ther medical evidence" in Subsection (a)(4). Likewise, even the reference to "the documented opinion of *a* physician" in Subsection (a)(4) (emphasis added) is made only in a context that seems to require that the opinion be considered along with "[o]ther medical evidence." Thus, use of a singular term in Subsections (a)(1) and (a)(4), if it is not simply the result of careless drafting, suggests only that a single piece of evidence *may* be sufficient to "establish" disease or impairment, not

[16] Use of the word "studies" in Subsections (a)(2) and (3) indicates consideration of more than one set of results. Although ventilatory function and blood gas studies do consist of a series of tests, the regulations on other occasions refer to such a series of tests as a single "study." See 20 C.F.R. 410.426(b) (referring to "a ventilatory study"); 20 C.F.R. 718.105(b) and (c) (referring to "a blood-gas study").

that a single item of evidence compels invocation of the presumption.

Most significant, each of the four subsections that define methods for invoking the presumption explicitly provides that a presumption of disability is invoked only if specified facts are "establish[ed]" (§ (a)(1), (2), and (4)) or "demonstrate[d]" (§ (a)(3)). This language strongly suggests a weighing process. For evidence to "establish" a fact, the evidence must be evaluated; and evaluation cannot occur in complete isolation from other relevant evidence. Thus, a single positive X-ray would not "establish" pneumoconiosis if other X-ray, biopsy, or autopsy evidence—for example, several negative X-rays taken more recently and read by more expert readers—convinced the trier of fact that pneumoconiosis was not likely to be present. The process of "establishing" the basic facts at the invocation stage is most reasonably construed to require weighing all other like-kind evidence—and doing so under the usual, preponderance-of-the-evidence standard.[17]

[17] At the Director's urging, the courts of appeals, including the court below, have unanimously concluded that the rebutting party meets its parallel obligation to "establish" its case under Subsection (b) only by proving by a preponderance of the evidence that the miner does not have pneumoconiosis, is not disabled, or is not disabled even in part as a result of coal mine employment. See Pet. App. 23a-25a (opinion of Hall, J.); *Amax Coal Co.* v. *Director, OWCP*, 801 F.2d 958, 963-964 (7th Cir. 1986); *Kaiser Steel Corp.* v. *Director, OWCP*, 748 F.2d 1426, 1430 (10th Cir. 1984); *Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 124 (4th Cir. 1984); *Alabama By-Products* v. *Killingsworth*, 733 F.2d 1511, 1513-1515 (11th Cir. 1984); *Consolidation Coal*

The court of appeals' interpretation of the regulation fails to account adequately for the use of the word "establish." It makes little sense to say that a fact is "established" at the invocation stage (*e.g.*, pneumoconiosis, under § (a)(1)) if the fact is fully open at the rebuttal stage for litigation with all like-kind evidence (*e.g.*, X-ray, biopsy, or autopsy evidence, for § (a)(1)). If any issue may be litigated, and any evidence may be considered, at the rebuttal stage, nothing is "established" at the invocation stage. Under the Fourth Circuit's view, all that is required is an X-ray *that has been interpreted* to "establish" pneumoconiosis. Such a construction is, at the very least, in tension with the regulatory language.

The linguistic awkwardness of the court of appeals' reading of the regulation is highlighted by a recent panel decision of the Fourth Circuit construing the decision below. In *Haynes* v. *Jewell Ridge Coal Corp.*, 790 F.2d 1113 (4th Cir. 1986), the court held that the presumption should have been invoked under Subsection (a)(1) where a number of X-rays had been interpreted as negative by all readers and a single X-ray had been interpreted as positive by two readers and negative by six. The court held that "[i]f a single *reading* of a qualifying X-ray indicates the presence of pneumoconiosis, the (a)(1) presumption is triggered" (790 F.2d at 1114 (emphasis added)), and "[c]onflicting interpretations"

Co. v. *Smith*, 699 F.2d 446, 449 (8th Cir. 1983). See also *Palmer Coking Coal Co.* v. *Director, OWCP*, 720 F.2d 1054, 1058 (9th Cir. 1983) (rebutting party "must produce sufficient evidence").

are to be considered on rebuttal (*ibid.*).[18] Thus, in the Fourth Circuit's view of the regulation, the medical evidence that invokes the presumption may in fact be wholly discredited and thus ultimately not even reliable, probative evidence of pneumoconiosis or impairment. Such evidence cannot reasonably be said to "establish" impairment or disease.[19]

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[18] A panel of the Sixth Circuit has explicitly disagreed with the method of analysis advanced by the Fourth Circuit in *Haynes*. In *Lambert* v. *Director, OWCP*, No. 85-3789 (Nov. 4, 1986), petition cert. pending, No. 86-6296, the Sixth Circuit, relying on its previous ruling in a Part B case, *Lawson* v. *Secretary of Health & Human Services*, 688 F.2d 436 (6th Cir. 1982), noted that to allow invocation on a single positive reading " 'would mean that a claimant could have an X-ray that has been read as negative repeatedly reread until he achieves a positive reading.' " *Lambert*, slip op. 4 (quoting 688 F.2d at 438). Accord, *Back* v. *Director, OWCP*, 796 F.2d 169, 171-172 (6th Cir. 1986).

[19] Those courts that have upheld the interim presumption against constitutional attack have done so because they found a rational connection between the proven facts—10 years' coal mine employment and simple pneumoconiosis or a significant respiratory impairment—and the presumed facts—totally disabling pneumoconiosis arising from coal mine employment. *Alabama By-Products Corp.* v. *Killingsworth*, 733 F.2d at 1516-1518; *Kaiser Steel Corp.* v. *Director, OWCP*, 757 F.2d 1078, 1083-1084 (10th Cir. 1985). See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 28-29 ("worth repeating" that statutory presumption, 30 U.S.C. 921(c)(1), is triggered only on "proof of pneumoconiosis"). It is unclear how one piece of disputed evidence—such as a single positive X-ray reading that is ultimately discredited by conclusive negative autopsy evidence—could provide a rational basis for presumptive eligibility to benefits. See, *e.g.*, *Lagamba* v. *Consolidation Coal Co.*, 787 F.2d 172 (4th Cir. 1986) (allowing invocation under Subsection (a)(1), as well as Subsection (a)(3), even though autopsy evidence was negative). The Fourth Circuit's reading of the interim regulations thus strains the constitutional basis for the presumption.

2. The Director's interpretation of his regulation sets out an orderly, sensible, and altogether usual method of considering "all relevant medical evidence" (Subsection (b)).[20] For each particular Subsection (a) category under which the claimant seeks to invoke the presumption, the ALJ examines all evidence, from both parties, of the type specified in that category. The ALJ must first ascertain whether any of the evidence meets certain standards of reliability. See note 7, *supra*. If such evidence exists, and is uncontroverted, the ALJ is compelled to invoke the presumption. Cf. *Ansel* v. *Weinberger*, 529 F.2d 304, 309 (6th Cir. 1976) (statutory presumption at 30 U.S.C. 921(c)(4)). If the evidence is controverted, the ALJ, like any other trier of fact, must focus on the relative weight to be accorded each piece of evidence. *Director, OWCP* v. *Rowe*, 710 F.2d 251, 254-255 (6th Cir. 1983); *Peabody Coal Co.* v. *Benefits Review Bd.*, 560 F.2d 797, 802 (7th Cir. 1977) (citing *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403, 405 (2d Cir. 1961), and *Todd Shipyards Corp.* v. *Donovan*, 300 F.2d 741 (5th Cir. 1982)).

[20] Contrary to the Fourth Circuit (Pet. App. 23a (opinion of Hall. J.)), the placement of this requirement at the beginning of the rebuttal section in no way suggests that weighing of evidence is excluded at the invocation stage. By its own terms, the requirement applies to the entire adjudication under the interim regulations, including both Subsections (a) and (b). Moreover, under any reading of Subsection (a), the evidence considered at the invocation stage is limited to that specified in the particular invocation category (*e.g.*, ventilatory studies under § (a)(2)); consideration of all remaining relevant evidence inevitably takes place at the rebuttal stage, and the command to consider *all* evidence is thus most sensibly placed in the rebuttal section of the regulation. Finally, the requirement was expressly included in the regulation in response to comments focused on the rebuttal stage. See 43 Fed. Reg. 36826 (1978) ("[t]he interim presumption is, by statute, rebuttable and the Department has no authority to make it irrebuttable").

A number of unsurprising evidentiary principles commonly enter into this weighing process. First, because pneumoconiosis is a progressive disease, a later qualifying X-ray, ventilatory study, or blood gas study generally deserves more weight than an earlier negative result. See *Consolidation Coal Co.* v. *Chubb*, 741 F.2d 968, 973 (7th Cir. 1984). Similarly, an X-ray interpretation by a certified expert in reading X-rays (a so-called "B"-reader) is usually more persuasive than an X-ray reading by a general practitioner. See *Sharpless* v. *Califano*, 585 F.2d 664, 666-667 (4th Cir. 1978); *Moseley* v. *Peabody Coal Co.*, 769 F.2d 357, 360 n.3 (6th Cir. 1985); *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 973. Likewise, a medical conclusion regarding disability, offered under Subsection (a)(4), is more probative if rendered by the claimant's treating physician or a pulmonary specialist than if rendered by any other doctor who has examined the claimant only once. The evidentiary value of a physician's opinion is also increased if it is based on objective tests and examination results. See 20 C.F.R. 410.471.

Once the threshold established by the presumption is crossed, the rebutting party bears the burden of disproving the "presumed" facts—the elements of a valid claim to benefits that have not been "established" at the invocation stage. The "basic" facts established to invoke the presumption, however, cannot be relitigated by use of the same kind of evidence considered at the invocation stage, since those facts are taken to be proved, and *all* evidence of the specified type has been weighed at the earlier stage. See,

e.g., Pet. App. 39a n.5 (opinion of Phillips, J.). For example, if a claimant has successfully invoked the presumption under Subsection (a)(4), he has necessarily proven by a preponderance of the medical evidence the presence of a totally disabling respiratory or pulmonary impairment. The rebutting party may then attempt to show that the disability is not due to coal mine employment (§ (b)(3)) or that the claimant does not have pneumoconiosis (§ (b)(4)). The rebutting party may also attempt to use *non-medical* evidence, such as evidence of actual comparable gainful work, to show that the miner is not disabled within the meaning of Subsections (b)(1) and (2). But *medical* evidence bearing on disability, having been considered once in connection with the issue of disability, will not be considered again on that issue (though, if relevant, it may be considered on the issues of pneumoconiosis and mine-relatedness). Similarly, if a claimant has invoked the presumption under Subsection (a)(1), he has proven that he suffers from pneumoconiosis by the weight of the X-ray, biopsy, and autopsy evidence.[21] The rebutting party can dispute disability (§ (b)(1) and (2)) or mine-relatedness (§ (b)(3)) but cannot seek to disprove the existence of pneumoconiosis (§ (b)(4)) solely on the basis of the kind of evidence specified in Subsection (a)(1).[22]

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[21] Contrary to the majority's conclusion below (Pet. App. 71a n.10 (opinion of Sprouse, J.)), if a claimant attempts to invoke the presumption under Subsection (a)(1) based on X-ray evidence, the ALJ, under the Director's approach, would consider biopsy or autopsy evidence showing that the claimant does not suffer from pneumoconiosis before the presumption is invoked. See *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 974.

[22] Based on current medical knowledge, X-ray, biopsy, and autopsy evidence are today the only reliable evidence for diagnosing pneumoconiosis. Therefore, after a Subsection (a)(1) invocation, the question of pneumoconiosis is effectively closed: the rebutting party cannot, as a practical matter, attempt to show that the miner does not suffer from some form of clinical pneumoconiosis. Other issues remain open. Thus, a physician's opinion on the *cause* of the clinical pneumoconiosis—*e.g.*, that the condition was caused by exposure to asbestos, cotton dust, or silica unrelated to coal mining—would certainly be admitted in rebuttal.

Contrary to the views of some of the judges below (see Pet. App. 21a (opinion of Hall, J.), 71a n.10 (opinion of Sprouse, J.)), this scheme excludes consideration of no relevant evidence; nor does it render the presumption irrebuttable. It simply allocates certain issues and evidence to the presumption stage and prohibits relitigation of the same issues based on the same evidence. Similarly, the proof scheme in no way eliminates the substantial advantages to claimants that presumptions afford, as the majority below believed (Pet. App. 70a, 77a-83a (opinion of Sprouse, J.), 94a (opinion of Widener, J.)). A claimant invokes the presumption without establishing each and every element of entitlement to benefits. Rather, for each of the categories of Subsection (a), the claimant proves only certain facts with only certain evidence (*e.g.*, pneumoconiosis under § (a)(1) with X-ray, biopsy, and autopsy evidence). At the rebuttal stage, the presumed facts (*e.g.*, disability and mine-relatedness, in the case of a § (a)(1) presumption) are open, but the burden of proof is shifted. The basic facts remain open only to the extent there is relevant evidence different in kind from that offered at the presumption stage. See Pet. App. 39a n.5 (opinion of Phillips, J.). Under this proof scheme, all evidence is considered in an orderly sequence, and proof of different elements of a valid

claim for benefits is clearly allocated to two different stages, with claimants relieved of the burden of proof at the second stage.[23]

This allocation of issues to the two stages of the presumption-rebuttal proof scheme has express support in the black lung statute itself. Under 30 U.S.C. 921(c)(4), a miner with 15 years' coal mine employment who "demonstrates the existence of a totally disabling respiratory or pulmonary impairment" is entitled to a presumption that he is totally disabled due to pneumoconiosis. That presumption may be rebutted "only by establishing" that the miner does not have pneumoconiosis or that his disability did not arise from coal mine employment. See, *e.g.*, *Ansel* v. *Weinberger*, 529 F.2d at 310. See also *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. at 51 (Stewart J., concurring in part and dissenting in part). The issue of disability is not open for relitigation on rebuttal. The interim presumption, under the Director's interpretation, works in much the same way.

The Director's interpretation of the interim presumption reflects common notions and practices concerning burdens of proof.[24] Recognizing that the allocation of burdens of proof on particular issues in particular lawsuits depends on considerations of "policy and fairness based on experience" (9 J. Wigmore, *Wigmore on Evidence* § 2486 (1981); E.

[23] As noted above (see page 15, *supra*), all issues appear to remain open on rebuttal under the court of appeals' reading of the regulations.

[24] The Federal Rules of Evidence do not apply to administrative black lung benefit proceedings. See 20 C.F.R. 725.455(b) and 33 U.S.C. 923(a), as incorporated by 30 U.S.C. (Supp. III) 932(a); *American Coal Co.* v. *Benefit Review Bd.*, 738 F.2d 387, 390-391 (10th Cir. 1984); *Alabama By-Products Corp.* v. *Killingsworth*, 733 F.2d at 1515.

Cleary, *McCormick on Evidence* § 345 (2d ed. 1972)), courts and legislatures have adopted many types of evidentiary devices, such as presumptions, prima facie showings, and affirmative defenses.[25] There is a class of presumptions that have been labelled "conditional imperatives," where if one party proves a particular fact, the burden of disproving a second fact shifts to the opposing party. See Allen, *Presumptions in Civil Actions Reconsidered*, 66 Iowa L. Rev. 843, 850-851 (1981). The Director's interpretation of the Part C interim proof scheme creates precisely that type of presumption, with one modification: because the regulation specifies the types of evidence to be considered as well as the facts to be proved at the invocation stage, those facts remain open after invocation to the extent (see note 22, *supra*) that there is relevant evidence other than the type considered at the first stage.

[25] See, *e.g.*, *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983) (under National Labor Relations Act, 29 U.S.C. (& Supp. III) 151 *et seq.*, plaintiff proves by a preponderance that defendant's discharge of plaintiff was motivated in part by plaintiff's protected activity; defendant may prove by a preponderance that same action would have been taken despite plaintiff's protected activity); *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) (under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.*, plaintiff proves prima facie case of employment discrimination by proving certain facts by a preponderance of the evidence; defendant produces evidence of nondiscriminatory motive; plaintiff must prove by a preponderance that defendant's articulated motive is pretext); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979) (under 25 U.S.C. 194, Indian proves previous possession of land; non-Indian must prove title).

B. The Director's interpretation of the interim regulations is consistent with statutory requirements and with congressional intent

1. The Director's interpretation of the interim regulations is wholly in accord with the two relevant statutory requirements of, as well as with the intent behind, the black lung statute. It plainly provides for consideration of "all relevant evidence * * * where relevant" (30 U.S.C. 923(b)). See also H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978) ("in determining claims under such criteria all relevant medical evidence shall be considered"). The difference between the Director's view and the Fourth Circuit's is not whether, but only where in the process, evidence is considered. In the Fourth Circuit's view, all but a single piece of qualifying evidence is considered at the rebuttal stage. In the Director's view, all evidence of the type specified in each Subsection (a) category is considered at the invocation stage and, if relevant to non-invocation issues, on rebuttal; and all other evidence is considered on rebuttal.[26]

The Director's interpretation also gives full effect to the requirement of the Black Lung Benefits Re-

[26] Unsurprisingly, the court of appeals did not assert that the Director's view violates the statutory prohibition against the Director's re-reading certain X-rays that have been read as positive (30 U.S.C. 923(b)). Although re-readings obtained by other parties are accepted as evidence, as are other X-rays, the Director does not re-read the statutorily specified qualifying positive X-rays. The Director's view also fully comports with the prohibition against denying a claim "solely on the basis of the results of a chest [X-ray]" (*ibid.*). Although all X-ray evidence is weighed, no claim is denied on the basis of a single negative X-ray. Nor is there any doubt that claimants are afforded the "opportunity to substantiate * * * claim[s] by means of a complete pulmonary evaluation" (*ibid.*).

form Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 96, that the interim regulations may "not be more restrictive" than the regulations governing claims under Part B of the program (30 U.S.C. 902(f)(2)). The very wording of this restriction makes clear that the requirement is satisfied by regulations modeled on those governing Part B claims and interpreted in a parallel fashion. The legislative history confirms this and, indeed, evinces a clear expectation that the Part C interim medical criteria would in fact be borrowed from Part B. Thus, the Conference Report (H.R. Rep. 95-864, *supra*, at 16) states that "the so-called 'interim' part B medical standards are to be applied to all reviewed and pending claims filed before the date the Secretary of Labor promulgates new medical standards." See also H.R. Rep. 95-151, 95th Cong., 1st Sess. 15 (1977). Moreover, in the House discussion of the Conference bill, Representative Perkins, the senior House member on the Conference Committee and the Chairman of the Committee that reported the original bill, stated that the Part B standards "will continue to apply into the future as well, until such time as the Secretary of Labor promulgates new regulations" (124 Cong. Rec. 3426 (1978)). See also 124 Cong. Rec. 3431 ((1978) (statement of Rep. Perkins) ("[a]s for the Labor Department, it too must apply the [Part B] interim standards to all of the claims filed under Part C, at least until such time as the Secretary of Labor promulgates new standards"); *ibid.* (statement of Rep. Simon).

In fact, the Part C interim regulations, and the Director's reading of them, are modelled on the Part

B regulations administered by the Social Security Administration (20 C.F.R. 410.490(b)).[27] Under both sets of regulations, proof of pneumoconiosis by X-ray, autopsy, or biopsy evidence or proof of a respiratory or pulmonary impairment by specified results on ventilatory function tests, combined with ten years' coal mine employment (or, in some cases, other specified evidence that the disease or impairment arose from coal mine employment), entitles a claimant to a rebuttable presumption of disability. 20 C.F.R. 727.203(a)(1) and (2), 410.490(b). In addition, the Part C medical criteria are, in some respects, more generous towards claimants than the Part B regulations. Thus, they allow claimants to invoke the presumption by proof of impairment as demonstrated by the results of blood gas studies or by

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[27] The Part B regulations utilized by SSA provide, among other things, that a miner will be presumed totally disabled due to pneumoconiosis if either "[a] chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis" or "[i]n the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease" and "[t]he impairment * * * arose out of coal mine employment." Ten years' coal mine employment gives rise to a rebuttable presumption that demonstrated pneumoconiosis arose from such employment. 20 C.F.R. 410.490(b)(2), 410.416, 410.456. The presumption is rebutted if "[t]here is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work" or "[o]ther evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work." 20 C.F.R. 410.490(c).

"other medical evidence" establishing a totally disabling respiratory or pulmonary impairment.

Most important for this case, it has long been clear that all like-kind evidence is weighed in determining invocation of the presumption available to Part B claimants under 20 C.F.R. 410.490(b). See, *e.g.*, *Vintson* v. *Califano*, 592 F.2d 1353, 1356-1359 (5th Cir. 1979); *Gober* v. *Matthews*, 574 F.2d 772, 775 (3d Cir. 1978); see also *Lawson* v. *Secretary of Health & Human Services*, 688 F.2d 436, 438-439 (6th Cir. 1982); *Hill* v. *Weinberger*, 430 F. Supp. 332 (E.D. Tenn. 1976); *Tonker* v. *Mathews*, 412 F. Supp. 823 (W.D. Va. 1976); *Zirkle* v. *Weinberger*, 401 F. Supp. 945 (N.D. W.Va. 1975). On at least one occasion, the Secretary of HEW plainly articulated his view that conflicting interpretations of a single X-ray must be weighed. *Hill* v. *Weinberger*, 430 F. Supp. at 334-335. Indeed, the Fourth Circuit itself recognized as early as 1978, the year the Part C interim regulations were promulgated, that a weighing of evidence takes place under Part B at the invocation stage. *Sharpless* v. *Califano*, 585 F.2d at 667. Agreeing that X-ray evidence should be weighed in establishing entitlement to the Part B presumption, the Fourth Circuit noted: "[w]e know of nothing in the Act * * * or * * * legislative history, to indicate that this fact is not required to be proved by a preponderance of the evidence as is every other fact which is not presumed." *Ibid.* Similarly, in *Pannell* v. *Califano*, 614 F.2d 391, 393 (1980), another Part B case, the Fourth Circuit stated that "[t]he claimant has the burden of proving his entitlement to the presumption under the regulations by a preponderance of the evidence." The Director's view of the Part C interim regulations simply follows this

Part B practice and thereby implements what Congress clearly intended when it authorized the regulations in 1978.

The Director's reading of the Part C interim regulations also gives full effect to the compensatory purposes of the black lung benefits statute, which was enacted to "provide benefits * * * to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease." 30 U.S.C. 901(a). As shown by the creation of certain statutory presumptions (30 U.S.C. 921(c)), which are not at issue here, and by the several restrictions on the use of unreliable negative X-ray evidence (30 U.S.C. 923 (b)), Congress intended miners to receive the benefit of the doubt in this medically-controversial area, even as it restricted benefits to those who, under reasonable evidentiary standards, could be shown to be actually disabled by mine-related pneumoconiosis.[28] Contrary to the Fourth Circuit's implicit conclusion, there is no reason to think that Congress believed that those legislative responses to the difficulties of medical proof were inadequate or that the interim presumption should be structured to furnish miners with additional assistance in proving their claims beyond the medical standards set by the Part B regulations.

[28] In 1977, the House Education and Labor Committee proposed that benefits should be awarded based solely on length of coal mine employment, with no evidence of disability or disease. See H.R. Rep. 95-151, *supra*, at 5. This proposal was not enacted. In addition, there was considerable debate in the 95th Congress over whether "simple" pneumoconiosis as established by X-ray evidence could ever be disabling. See *Alabama By-Products* v. *Killingsworth*, 733 F.2d at 1517-1518.

Under the Director's reading, the interim presumption allows certain miners to invoke a presumption of entitlement to benefits without proving all elements of a valid claim (pneumoconiosis, disability, mine-relatedness). Thus, a claimant with a minimum of 10 years' coal mine employment [29] shifts the burden of proof by establishing only certain aspects of his claim—pneumoconiosis (§ (a)(1)), a specified degree of respiratory or pulmonary impairment (§ (a)(2) and (3)), or a totally disabling respiratory or pulmonary impairment (§ (a)(4))—using certain specified types of evidence. That shifted burden must be carried by a preponderance of the evidence.

In addition to thus relieving the claimant of substantial proof obligations, the Director's approach also facilitates claimants' efforts to obtain benefits by following the "true doubt" rule. Where there is equally probative but contradictory evidence, doubt must be resolved in the claimant's favor. See, *e.g.*, 43 Fed. Reg. 36826 (1978); *Conley* v. *Robert & Schaefer Co.*, 7 B.L.R. (MB) 1-309 (Ben. Rev. Bd. 1984); *Provance* v. *United States Steel Corp.*, 1 B.L.R. (MB) 1-483 (Ben. Rev. Bd. 1978). As noted above, this rule, by mandating that close calls go to the claimant, makes it difficult to distinguish the Director's view from that of the Fourth Circuit in the

[29] The ten year employment requirement presumptively establishes that the proven disease or impairment arose from coal mine employment. See *Usery* v. *Turner Elkhorn*, 428 U.S. at 28-30. Two courts of appeals have concluded that a claimant with less than 10 years' coal mine employment may also invoke the interim presumption if he or she can otherwise prove the causation element. See *Halon* v. *Director, OWCP*, 713 F.2d 21 (3d Cir. 1983); *Coughlan* v. *Director, OWCP*, 757 F.2d 966 (8th Cir. 1985).

outcomes they will produce. The Director's view certainly satisfies congressional concerns for ameliorating evidentiary difficulties faced by miners seeking to establish entitlement to benefits.

2. The Director's interpretation of the interim presumption also conforms to the burden-of-proof requirements of Section 7(c) of the Administrative Procedure Act (APA) (codified at 5 U.S.C. 556(d)), as modified by the "true doubt" rule.[30] As recent decisions of this Court demonstrate, Section 7(c)[31] ad-

[30] Contrary to petitioners' argument, Section 7(c) of the APA, 5 U.S.C. 556(d), does not appear to apply of its own force to the Secretary's black lung regulations. Although the black lung statute (30 U.S.C. 932(a)) generally incorporates 33 U.S.C. 919(d), which in turn generally incorporates APA provisions, including Section 7(c), the black lung statute contains an express exception to this incorporation where "otherwise provided * * * by regulations of the Secretary" (30 U.S.C. 932(a)). In addition, the first sentence of Section 7(c) itself begins "[e]xcept as otherwise provided by statute * * *." Those exceptions, together with the broad authorization to promulgate appropriate regulations (30 U.S.C. 902(f)), give the Secretary, and hence the Director, authority to depart from APA standards.

Nevertheless, the Secretary has elected to incorporate certain provisions of the APA, not expressly including Section 7(c), into his regulations governing hearings on black lung claims. See 20 C.F.R. 725.452(a), 725.455(b), 727.109(a). Moreover, we think it relevant to the reasonableness of the Director's view that it conforms to generally applicable APA requirements.

[31] The section provides, in relevant part, that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof. * * * A sanction may not be imposed or rule or order issued except on consideration of the whole record * * * and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. 556(d).

dresses two separate questions: the burden imposed upon the proponent of a particular order; and the quantity of evidence necessary to sustain an agency's decision, whether it is favorable or unfavorable to the proponent. On the first question, Section 7(c) requires that the party advocating a particular result bear only a burden of production. *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 403-404 n.7 (1983). On the second question, Section 7(c) requires that the agency's decision, following an evidentiary hearing, be based upon a preponderance of the evidence. *Steadman* v. *SEC*, 450 U.S. 91, 95-106 (1981). See generally *Attorney General's Manual on the Administrative Procedure Act* 75-77 (1947).

The Director's interpretation of his regulations meets both of those requirements. Both the claimants and the rebutting parties bear a burden of persuasion, and hence at least the required burden of production, with respect to the facts that they must prove. The ALJ decision on each of the facts at issue must, in turn, be supported by a preponderance of the evidence, as modified by the "true doubt" rule.[32]

[32] The Fourth Circuit's construction of the interim presumption appears to meet APA requirements as well. In that view, the claimant bears a burden of production at the invocation stage, and the rebutting party bears a burden of persuasion. The ALJ's decision on each requisite fact must be supported by a preponderance of the evidence, as modified by the "true doubt" rule.

If the Fourth Circuit's view on invocation were combined with a restrictive view of what rebuttal evidence is admissible, such as the principles articulated in the now-overruled *Hampton* and *Whicker* decisions, the standards might violate Section 7(c)'s requirement that ALJ decisions be supported by the weight of the reliable and probative evidence.

C. The Director's view has been consistently maintained and represents long-standing administrative practice

1. The Benefits Review Board has, with a single exception,[32] consistently reviewed ALJs' determinations regarding invocation of the presumption under a preponderance standard. See, *e.g.*, *Elkins* v. *Elkhorn Corp.*, 2 B.L.R. (MB) 1-683 (Ben. Rev. Bd. 1979) (§ (a)(1)); *Struko* v. *Ziegler Coal Co.*, 3 B.L.R. (MB) 1-136 (Ben. Rev. Bd. 1981) (§ (a)(2)); *Lessar* v. *C.F. & I. Steel Corp.*, 3 B.L.R. (MB) 1-63 (Ben. Rev. Bd. 1981) (§ (a)(3)). Similarly, prior to the Fourth Circuit decision in this case, the courts of appeals had routinely reviewed for substantial evidence the factfinder's conclusion that a preponderance of a certain type of evidence supported the presumption. See, *e.g.*, *Back* v. *Director, OWCP*, 796 F.2d 169, 172 (6th Cir. 1986) (citing cases); *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 972-974; *Bozick* v. *Consolidation Coal Co.*, 735 F.2d 1017 (6th Cir. 1984), vacating 732 F.2d 64 (6th Cir. 1984); *Consolidation Coal Co.* v. *Sanati*, *supra*; *Markus* v. *Old Ben Coal Co.*, 712 F.2d 322, 326-327 (7th Cir. 1983). Thus, it is the Fourth Circuit's reformulation of the evidentiary standard, and not the Director's interpretation of his regulations, that represents a

[32] In *Stiner* v. *Bethlehem Mines Corp.*, 3 B.L.R. (MB) 1-487 (Ben. Rev. Bd. 1981), the Board concluded that the presumption must be invoked under Subsection (a)(4) if a single reasoned medical opinion establishes the presence of a totally disabling respiratory or pulmonary impairment. The Board subsequently overruled that decision, *Meadows* v. *Westmoreland Coal Co.*, 6 B.L.R. (MB) 1-773 (Ben. Rev. Bd. 1984), persuaded by the Fourth Circuit's reasoning in *Consolidation Coal Co.* v. *Sanati*, *supra*.

departure from long-standing administrative practice. That is why the decision below would require such extensive relitigation of pending claims.[34]

2. The Fourth Circuit erred in concluding (see note 14, *supra*) that the Director had at one time generally adhered to the court of appeals' construction of the presumption. The Director's policy, since the promulgation of the interim criteria in 1978, has been that all like-kind evidence must be weighed in determining whether a claimant has met one of the four medical evidentiary requirements specified in Subsection (a) and is therefore entitled to invoke the presumption.[35] Indeed, as the court of appeals should

[34] Application of the Fourth Circuit's interpretation of the interim presumption to all pending claims would greatly burden the administrative system and would require administrative reconsideration of a substantial number of cases. The Office of Workers' Compensation Programs estimates that at least 10,000 of the 25,000 pending black lung cases involve the interim presumption. There are currently over 200 black lung cases pending in the courts of appeals, and most of them involve the interim regulations. The Fourth Circuit and the Benefits Review Board together have already remanded at least 80 cases for reconsideration in light of the new Fourth Circuit standard.

The Third Circuit has also recently issued a panel decision that agrees with the Fourth Circuit's view. See *Revak* v. *National Mines Corp.*, 808 F.2d 996 (3d Cir. 1986). By contrast, the Sixth Circuit has rejected the Fourth Circuit's view. *Back* v. *Director, OWCP*, 796 F.2d at 172; *Engle* v. *Director, OWCP*, 792 F.2d 63 (1986). The Seventh Circuit appears to take a position different from that of the Third, Fourth, or Sixth Circuits. See *Amax Coal Co.* v. *Director, OWCP*, 801 F.2d at 962; *Kuehner* v. *Ziegler Coal Co.*, 788 F.2d 439, 449 (1986).

[35] The majority's observation (Pet. App. 62a (opinion of Sprouse, J.)) that the Secretary considered and rejected "a proposed provision requiring the weighing of all medical test evidence to invoke the presumption" is beside the point. The

have been aware, the Director had successfully urged adoption of the preponderance standard under Subsection (a)(4) in *Consolidation Coal Co.* v. *Sanati*, *supra*, in 1982.

Contrary to the Fourth Circuit's assertion (see note 14, *supra*), the Secretary's comments issued in connection with the promulgation of the interim criteria (43 Fed. Reg. 36826 (1978)) do not undermine the Director's view or reduce the deference owed to it. The purpose of the comments was to explain, in a balanced if somewhat opaque manner, the dual point that, while no relevant evidence would be excluded from consideration in rebuttal, doubts would be resolved in favor of the claimant. Thus, the Secretary first noted that the Department could not make the presumption irrebuttable by singling out certain positive evidence and overlooking other relevant evidence: "[T]he Department cannot, as has been requested by some, look for the single item of evidence which would qualify a claimant on the basis of the interim presumption, and ignore other previously obtained evidence." *Ibid.* The Secretary then stressed, on the other hand, that this refusal to overlook relevant negative evidence would not alter the fact that the process would be tilted in favor of miners' claims (*ibid.*):

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proposed regulation would have required the adjudicator to consider all medical evidence of disability together rather than in the separate categories, such as ventilatory or blood gas studies or medical opinions, recognized by the interim presumption. It thus would have imposed a substantially greater burden on claimants than the regulation that was adopted. See Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869, 896 n.138 (1981).

> This does not mean that the single item of evidence which establishes the presumption is overcome by a single item of evidence which rebuts the presumption. The Act embodies the principle that doubt is to be resolved in favor of the claimant, and that principle plays an important role in claims determinations both under the interim presumption and otherwise.

These remarks thus both demonstrate that the rebutting party bears the burden of persuasion and state the "true doubt" rule—where equally probative but contradictory evidence is present, doubts are resolved in favor of the claimant. See, *e.g.*, *Conley* v. *Roberts & Schaefer Co.*, 7 B.L.R. (MB) at 1-312; *Kozele* v. *Rochester & Pittsburgh Coal Co.*, 6 B.L.R. (MB) 1-378 (Ben. Rev. Bd. 1984); *Lessar* v. *C.F. & I. Steel Corp.*, 3 B.L.R. (MB) 1-63 (Ben. Rev. Bd. 1981). Read in context, and in light of the consistent statements of the Director and practice of the Benefits Review Board since 1978, the Secretary's comments do not call for the Fourth Circuit's view that the presumption is necessarily invoked with one piece of evidence.[36]

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[36] In addition, there is evidence from the Secretary's promulgation of the regulations that tends to contradict the Fourth Circuit's view. First, the Secretary noted that another section of the interim regulations (20 C.F.R. 727.206), which deals with quality standards applicable to X-rays, was "not intended to suggest whether a particular X-ray is sufficient to satisfy the interim presumption." 43 Fed. Reg. 36828 (1978).

Second, the Secretary agreed to delete a provision of the proposed version of 20 C.F.R. 727.206 that seemed to permit "the consideration of any other relevant evidence including other X-rays and X-ray interpretations in determining the presence or absence of pneumoconiosis" (43 Fed. Reg. 17771 (1978)). If read, as its language suggests, to be applicable to

CONCLUSION

The decision of the court of appeals should be reversed, and the case should be remanded with instructions to reconsider the administrative decisions under the proper legal standard.

Respectfully submitted.

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the invocation stage, the proposed provision would flatly contradict the Fourth Circuit's reading of 20 C.F.R. 727.203. Yet no mention was made of the problem: the sole reason given for deleting the provision was that it had been "incorrectly interpreted to mean that the Department would reinterpret X-rays" covered by the statutory prohibition against rereading. 43 Fed. Reg. 36828 (1978). This silence suggests that the Fourth Circuit's reading of 20 C.F.R. 727.203 was not intended or perhaps even contemplated at the time of promulgation.

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